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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1944**

**No. 822**

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CHARLES FRANKLIN,

*Petitioner,*

vs.

THE CITY OF NEW YORK,

*Respondent.*

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MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

*Petitioners,*

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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CHARLES FRANKLIN,
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## PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

(Italics and bracketed matter in quotations ours.)

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above cause.

## Summary Statement of the Matter Involved [1]

This Court is asked to review the determination below which in effect denies any compensation to petitioner, Charles Franklin, for services rendered as the general counsel of Manhattan Railway Company, and its solicitor in the Interborough-Manhattan receivership (August 26, 1932 to June 12, 1940), the petitioner having devoted substantially his entire time over the 8-year period to such representation.

The outcome of petitioner's work was that the equity of Manhattan Railway Company, admittedly in a perilous position and regarded as worthless from the outset, was liquidated for $12,096,160.

The services were performed under agreement by resolutions adopted annually by Manhattan's board of directors to pay $15,000 per annum as fixed salary for the general counsel work (fols. 388-90, 368, 943) on which obligation $90,000 is due. The solicitor work was performed under formal agreement and resolutions to pay petitioner $250,000 for the services rendered during said receivership period (fols. 442-3, cf. fols. 3872-4, 3899-902) on which obligation $230,000 is due.

There is in present bank custody two reserve funds created by Manhattan stockholders to pay Manhattan Railway Company's legal compensation and expenses, in which there is available a balance in excess of $500,000 (fol. 372). Approximately 99% of the $12,096,160 were immediately distributed to the stockholders in 1940, the balance being held for legal and miscellaneous expenses (fols. 6568-9). The Committee and their counsel and other expenses have long since been paid out of the reserve funds.

The District Court allowed petitioner a total of $20,000 for all solicitor work performed over the receivership period

[1] The authority of former United States Circuit Judge Martin T. Manton to appoint receivers of the Interborough and Manhattan properties was sustained by this Court in *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479, in which petitioner attacked the jurisdiction of former Circuit Judge Manton.

on the theory that only services which benefited the receivership estate should be allowed, the Court declining to recognize corporate obligations or benefit to Manhattan Railway Company and its stockholders. No such restriction was applied to the other claimants who were similarly situated. This allowance represents one-fifth of petitioner's overhead office expense and leaves nothing but a heavy deficit for the services (see Petitioner's Ex. 124, p. 1940). Approval of $250,000 fees requested for solicitor services was given by formal resolutions (fols. 306-7, 3901-2), by letters from all the directors admitted in evidence (fols. 6181-6204), and by a majority of the Company's directors who also appeared as witnesses (fols. 514-5, 3240-2, 2384-5, 2430, 2444, 2498, 3146, 2454-5).

Since no allowance was made for the general counsel work the District Court on a subsequent application granted a total of $15,000 upon the liquidated claim of $90,000. The City offered no appraisal either of the general counsel or the solicitor services. The figure of $15,000 is the aggregate of $2,000 for 7½ years and was suggested by the Master (fol. 6741) who substituted his opinion for that of Circuit Judge Mack (fol. 6576) and the considered judgment of Manhattan's board of directors. In making the recommendation the Master explained: "I may not have a true picture of the situation or the value of the services rendered as general counsel" (fol. 6741).

Both allowances, and all payments made to petitioner of every nature, including payment during receivership for the work of transfer of the Company's stock and bonds, as well as his interest in the fee paid to counsel for the Modified Stock Committee, do not meet petitioner's out-of-pocket office overhead expense incurred in these matters. The District Court expressly so found (fols. 7294-5).

The stockholders of Manhattan Railway Company freely consented to the creation of the existing reserve funds. All of the Company's stockholders were informed by letters sent during the receivership, of the important prob-

lems and pending litigated matters, and of petitioner's labors on their behalf, while the Board resolutions, including those authorizing payment for his services, were read at the annual stockholders' meetings (fols. 2388, 2397-8, 2499, 2551). Nevertheless not one penny has been contributed from these reserve funds to pay petitioner's claim for his services rendered on behalf of the equity.

The net result of the action of the Court below is to deny any compensation whatsoever either for petitioner's services as Manhattan Railway Company's general counsel, or as its solicitor.

The only opposition to payment from the reserve funds comes from the City of New York, appearing solely as a holder of Manhattan stock, the City having acquired its shares long after petitioner's services were completed.[1]

The Protective Committees for Manhattan's two classes of stock filed supporting briefs in the Court below indicating their willingness that petitioner's fees should be paid out of the existing reserve funds.[2]

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[1] In moving to strike out the appearance of the City of New York upon the ground that it had no standing to object (*Taylor* v. *Holmes*, 127 U. S. 489; *Hawes* v. *Oakland*, 104 U. S. 450; *Venner* v. *Great Northern Ry.*, 153 Fed. 408 (S. D. N. Y.); *Jacobson* v. *General Motors Corp.*, 22 F. Supp. 255 (S. D. N. Y.), it was said:

> "Mr. Franklin: If it shall be contended that the City of New York is not appearing in this proceeding as a stockholder, but as a purchaser——
>
> Asst. Corporation Counsel Gaud: It won't be" (fol. 3403).

[2] Counsel for the Protective Committee for Manhattan Company's 7% Stock stated in their brief filed in the Court below: "The Committee for the 7% Stock does not object to a further allowance to Mr. Franklin * * * Mr. Watson, chairman of the Committee, and Mr. Joyce, vice-chairman, both testified as individuals that they thought the additional allowance sought by Mr. Franklin should be granted (fols. 2385, 3240-2). If any allowance to Mr. Franklin for services rendered Manhattan Railway Company is to be charged to the stockholders of the Company, then any such allowance should be prorated between the two groups of stockholders." Counsel for the Protective Committee for Manhattan Company's 5% Stock filed brief in the Court below to same effect.

In so far as the Manhattan stock is concerned, there is thus no opposition from anyone for whose benefit the services were rendered.

All of the lines of railroad, properties, including power houses, equipment, etc., were transferred to the City of New York under the terms of the so-called Plan of Unification by decree of the District Court dated June 12, 1940.

Two paragraphs of the Plan of Unification were inserted to provide the source from which petitioner was to be paid for his services, namely:

Article Six, paragraph 8, of the Plan, provides that the City of New York "will assume all debts and liabilities of and claims and demands against the Interborough Company or *the Manhattan Company*, contingent or otherwise * * * Without limiting the generality of the foregoing, the City shall assume * * * (d) * * * allowances, if any, which may be made by the District Court to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings" (Plan, p. 47).

As the Unification Plan involved the cessation of Manhattan's existence as a going concern, petitioner for his protection insisted in a series of letters to the special counsel for the Transit Commission and the City representative in drafting the Plan, that the reference to himself be inserted as Article Six, 8(d) of the Plan (fols. 1403-20, 5777-809). The purpose of the clause was explained as protection of his "right to be paid for services rendered as solicitor of Manhattan * * * for my services as general counsel of the Company" (fol. 5786); also for his services in related proceedings (fol. 5800, cf. fols. 5778-9), and direct allusion was made to the existing applications (fol. 5800) as setting forth the services which were to be covered by the clause (fols. 5799-800). Mr. Cuthell conceded the inclusion of the clause (fol. 1422).

Article Six, paragraph (6) of the Plan provided: "*The legal*, accounting, engineering *and other expenses and compensation of the Manhattan Railway Company* (except as

otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), whether heretofore or hereafter agreed to be paid or whether heretofore or hereafter incurred in the receivership proceedings * * * " shall be paid from the securities and cash allocated to the stockholders of the Manhattan Railway Company (Plan, p. 45).

The City of New York, acting by its Assistant Corporation Counsel Gaud, insisted before the District Court that petitioner's services "were clearly rendered on behalf of Manhattan and of its stockholders" and that "he should be compensated by his client" (fols. 319-20), again saying, "I think it is enough to say that he was representing the stock of the Company" (fol. 323). The City thus succeeded in having its position sustained by the District Court (fol. 330). Then when petitioner proceeded under Article Six, paragraph (6), the City decided to oppose on general principles, although admitting in a sworn document submitted in opposition that Article Six, paragraph (6), was inserted for the express purpose, consented to by all concerned, of enabling petitioner to enforce his outstanding agreements with the Manhattan Railway Company for payment of his services (fols. 479-82).

The opinion below does not discuss the legal principles advanced in brief and argument believed to be applicable and determinative of the issues. Instead the Court in effect takes away both sources provided in the Plan for payment of petitioner's compensation by what we believe to be an incorrect interpretation of Article Six, paragraphs (6) and 8(d), that is contrary to the expressed understanding of both sides, including the City's counsel who drafted these provisions of the Plan, as well as of other counsel who participated in its preparation (fols. 479-82).

Inasmuch as Manhattan's stockholders who might have a residual interest in the reserves are scattered throughout the world, the premature dispersal of the funds would leave petitioner in a most precarious position.

The Circuit Court of Appeals decision:

(1) On the appeal from the decree involving the application under Article Six (8)(d), sustained the construction of the District Court that the claim against the Manhattan Railway Company assumed by the City of New York should be liquidated on the theory of benefit to the receivership estate.

(2) On the appeals from the decree involving the application under Article Six (6), contrary to the position taken by both parties and contrary to the findings of the Special Master and the District Court, held that petitioner could take nothing under paragraph (6) because his claim as general counsel and solicitor "was expressly excepted therefrom". The Circuit Court of Appeals did, however, transfer the additional $15,000 from the award under paragraph (6) to the award under paragraph (8)(d).

## Questions Presented

(1) When an allowance is sought for services to a *private litigant,* to be paid by a *private litigant,* and *not* to be paid from the receivership estate, is the amount of the allowance controlled by benefit to the receivership estate?

(2) Was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to apply the rule of benefit to the receivership estate in determining the allowance for petitioner when similar applicants in the same cause and in other receivership causes have not been so restricted?

(3) When the parties, the Special Master and the District Court have concurred in an ultimate fact as to the meaning and intent of a contract, was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to disregard this fact and adopt a wholly different construction of the contract?

**Reasons Relied on for Allowance of the Writ**

1. The restriction to benefit to the receivership estate of the allowance for services to a private litigant and *not* to be paid from the receivership estate is in conflict with applicable decisions of this Court, *Sprague* v. *Ticonic National Bank,* 307 U. S. 161, decisions of other Circuit Courts of Appeals, *Sprague* v. *Ticonic Bank,* 110 F. (2d) 174 (1st Circuit) and *Crump* v. *Ramish,* 86 F. (2d) 362 (9th Circuit), as well as prior decisions of the Circuit Court of Appeals of the Second Circuit itself, *Clark* v. *Goldman,* 124 F. (2d) 491, and *Nolte* v. *Hudson Navigation Co.,* 47 F. (2d) 166.

2. The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in

(a) restricting petitioner to the theory of benefit to the receivership estate in determining the allowance of this petitioner when under comparable circumstances the Court had in the Interborough-Manhattan receivership itself, in *Palmer* v. *Watson,* 122 F. (2d) 598, held that benefit to the class represented was the criterion, and the District Court, also in the Interborough-Manhattan receivership, had made allowances assumed by the City, also by Article Six (8) of the Plan, on the theory of benefit to clients and without restriction to benefit to the receivership estate, and

(b) disregarding the construction placed on Article Six (6) of the Plan by the parties, the Special Master and the District Court that petitioner was entitled thereunder to compensation for services.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the decrees of the Circuit Court of Appeals for the Second Circuit in the above causes and that the said decrees be reversed.

New York, January 9, 1945.

Respectfully submitted,

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